2001

The State of Utah v. Kenneth Beach : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
KENNETH BEACH,	:	Case No. 20010445-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Attempted Unlawful Possession of a Controlled Substance, a Class A Misdemeanor, in violation of Utah Code Ann. § 58-37-8 (2)(a)(i) (1998), in the Third Judicial District Court, State of Utah, the Honorable David S. Young, presiding.

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NATURE OF THE PROCEEDINGS AND JURISDICTION

This is an appeal from a judgment of conviction[1] for Attempted Unlawful Possession of a Controlled Substance, a Class A Misdemeanor, in violation of Utah Code Ann. § 58-37-8 (2)(a)(i) (1998),[2] in the Third Judicial District Court, State of Utah, the Honorable David S. Young, presiding.

Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF THE FIRST ISSUE, STANDARD OF REVIEW, AND PRESERVATION OF THE ARGUMENT

Issue: Did the police have reasonable suspicion to stop and detain Appellant Kenneth

[1] A copy of the "Sentence, Judgment, Commitment," R. 43-45, is attached in Addendum A.

[2] This statute was amended effective 1 May 2001. However, because the Information was issued previously, R. 7-8, the former version of the statute is cited. See State v. Redd, 1999 UT 108 ¶ 4 n.2, 992 P.2d 986 ("[W]e apply the law as it existed at the time of the crime charged.")

Beach ["Mr. Beach"] after Mr. Beach leaned into the passenger window of a car, exchanged something with someone inside, and met a police officer's gaze as the officer drove by?

Standard of Review: "Although the trial judge is in the best position to determine the reasonableness of the [police officer's] conduct under the particular facts of each case, . . . we must correct errors in the application of the law to these facts." State v. Trujillo, 739 P.2d 85, 86-87 (Utah Ct. App. 1987) (citations omitted). Thus, a trial court's ultimate determination about whether specific facts support a reasonable suspicion of criminal activity is "a determination of law and is reviewable nondeferentially for correctness. . . ." State v. Contrel, 886 P.2d 107, 109 (Utah Ct. App. 1994) cert. denied State v. Contrel, 899 P.2d 1231 (Utah 1995) (quoting State v. Pena, 869 P.2d 932, 939 (Utah 1994)). See also Salt Lake City v. Ray, 2000 Utah Ct. App. 55, ¶ 8, 998 P.2d 274.

Preservation: This argument is preserved at R. 23-25.

STATEMENT OF THE SECOND ISSUE, STANDARD OF REVIEW AND PRESERVATION OF THE ARGUMENT

Issue: In light of the unlawful behavior of the police in stopping and detaining Mr. Beach without reasonable suspicion, was Mr. Beach's subsequent consent to a search of his person voluntarily given?

Standard of Review: A trial court's factual findings are reviewed under the clearly erroneous standard, while the ultimate conclusion of whether consent was voluntary or

involuntary is reviewed for correctness. State v. Ham, 910 P.2d 433, 438 (Utah Ct. App. 1996).

Preservation: This argument is preserved at R. 23-25.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provision from the United States Constitution is relevant on appeal. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The following statute is relevant on appeal. Utah Code Annotated section 77-7-15 provides:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Code Ann. § 77-7-15 (1999).

STATEMENT OF THE CASE

On 13 September 2000, Mr. Beach was charged by information with Unlawful Possession of a Controlled Substance. R. 7-8. He filed a Motion to Suppress evidence on

15 December 2000. R. 23-24.

At the hearing on the Motion, the defense counsel argued that evidence of controlled substances found in Mr. Beach's possession should be suppressed because the police officer who discovered them did not have reasonable suspicion to stop Mr. Beach in the first place. R. 65 [31-33]. Additionally, even if the officer did have reasonable suspicion, Mr. Beach gave a truthful explanation for his activities and his explanation was corroborated by witnesses. R. 65 [33-34]. The officer did not have the right to question Mr. Beach further. R. 65 [36-37]. Notwithstanding, the officer continued questioning Mr. Beach for a total of twenty-two minutes and discovered nothing other than a couple of routine traffic violations. R. 65 [35-39]. The controlled substances ultimately discovered in Mr. Beach's possession was obtained solely because of the officers' illegal questioning which exceeded the scope of the stop. R. 65 [39-41].

The trial court denied the Motion to Suppress. R. 65 [60-62]. Subsequently, Mr. Beach pled guilty to the Class A Misdemeanor of Attempted Possession of a Controlled Substance with the condition that he could appeal the trial court's denial of the Motion to Suppress evidence. R. 31-37. He was sentenced on 8 May 2001. R. 43-45. He filed a timely Notice of Appeal. R. 46-47.

STATEMENT OF THE FACTS

On 8 September 2000, Officer Aaron Leavitt ["Officer Leavitt"] was on patrol with Officer Josh Sharman ["Officer Sharman"] and Sergeant Rusty Issacson ["Sergeant

Issacson"] in an unmarked patrol car. R. 65 [6-7]. As they drove east along Sumonie Avenue, Officer Leavitt noticed a vehicle parked at the side of the road. R. 65 [7]. Sumonie Avenue is a narrow street, and the vehicle was blocking most of the westbound lane. Id. Mr. Beach was leaning into the passenger-side window speaking with the passenger. R. 65 [9]. As the officers approached, Officer Leavitt saw Mr. Beach make a "hand-to-hand exchange" with the passenger. Id. Officer Leavitt, who was driving, had to slow to five miles per hour to squeeze past the parked vehicle. R. 65 [10]. He met Mr. Beach's gaze as the cars passed. R. 65 [12]. Based on this, Officer Leavitt testified that he believed Mr. Beach was engaged in a drug transaction. R. 65 [11].

After passing, Officer Leavitt turned, pulled in behind the parked vehicle, and activated the police car's emergency lights. R. 65 [12]. Mr. Beach started walking away. Id. Officer Leavitt exited the police car and called out to Mr. Beach. R. 65 [13]. Officer Leavitt identified himself as a police officer and asked Mr. Beach to return and answer some questions. Id. In the meantime, Officer Sharman and Sergeant Issacson approached the two people in the parked car and began talking to them. R. 65 [19].

Officer Leavitt asked Mr. Beach to identify himself and explain what he was doing in the area. R. 65 [13, 20]. Mr. Beach said that he did not have a driver's license and gave the Officer a Utah identification card. R. 65 [25]. He also explained that he is in the business of buying old vehicles from salvage yards, refurbishing them, and selling them for profit. R. 65 [14]. He was selling a car to the people he had been talking to and had exchanged some paperwork with them. Id. The people in the car confirmed that Mr.

Beach was selling them the car.[3]

Officer Leavitt asked Mr. Beach whether he had any weapons, drugs, or needles. R. 65 [21]. Mr. Beach replied that he did not. Id. Officer Leavitt asked Mr. Beach if he would submit to a search. R. 65 [22]. Mr. Beach reached into his pockets and removed some of the contents, including a flyer, a yellow sales slip from an auto yard, and paperwork for the vehicle that he had been selling. R. 65 [22-23]. Meanwhile, Officer Sharman held Mr. Beach's state identification card and ran a check to determine the status of his driver's license and whether he had any outstanding warrants. R. 65 [26, 61]. The officers discovered that Mr. Beach's driver's license had been suspended.[4]

Officer Leavitt again asked Mr. Beach if he would submit to a search of his person. R. 65 [24-25]. Mr. Beach replied, "Well, did I do anything wrong?" R. 65[27]. Officer Leavitt asked Mr. Beach why he was nervous. Id. Mr. Beach produced an adult magazine, showed it to Officer Leavitt, and indicated that he was nervous because of the magazine. Id. Officer Leavitt looked at the magazine, returned it to Mr. Beach, and said he could have it. R. 65 [27-28]. About this time, Mr. Beach's state identification card was returned to him. R. 65 [28].

Officer Leavitt asked Mr. Beach a third time whether he would submit to a search

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[3] R. 65 [20]. Officer Sharman and Sergeant Issacson told Officer Leavitt after Mr. Beach's arrest that the people confirmed they were buying a car from Mr. Beach. Id. They said that they had planned to test drive the car that day. Id.

[4] R. 65 [26]. Mr. Beach also indicated that he had driven the car over to the buyer's home. The police did not issue him a citation for driving on a suspended license. Id.

of his person for drugs, needles, knives, weapons, or any other contraband. R. 65 [28]. He responded, "Go ahead." Id. Officer Leavitt said, "You don't have to let us if you don't want to we won't." Id. Mr. Beach responded, "I'm not going to lie to you guys, I have a little." R. 65 [30-31]. Mr. Beach reached into his pocket and pulled out a baggie that contained methamphetamine. R. 65 [31]. Then he consented to a search. R. 65 [14-15]. The officers searched him and found another baggie of methamphetamine. R. 65 [15]. At that point, the officers placed him under arrest. R. 65 [15].

Mr. Beach had been detained and questioned by the police for a total of twenty-two minutes prior to his arrest. R. 65 [16].

SUMMARY OF THE ARGUMENTS

Evidence of controlled substances found in Mr. Beach's possession should have been suppressed by the trial court because they are the fruit of an unconstitutional search and seizure. The police did not have reasonable suspicion to stop and detain Mr. Beach.[5] Mr. Beach was simply leaning into the passenger side window of a car speaking with the passenger. R. 65 [9]. He also exchanged something with the passenger. Id. However, he was not in front of a drug house, did not seem concerned with the officers' presence, and the police did not have information that he was involved in criminal activity. R. 65 [17-18]. In short, there was nothing to distinguish Mr. Beach's behavior from that of any

[5]See State v. Trujillo, 739 P.2d 85, 88 (Utah Ct. App. 1987) ("a 'brief investigatory stop of an individual by police officers is permissible when the officers have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'") (citation omitted).

other law-abiding citizen.[6]

Even if the police did have reasonable suspicion to stop Mr. Beach, the detainment should have ended as soon as the police discovered that Mr. Beach was not involved in a drug transaction.[7] Immediately after Officer Leavitt began questioning him, Mr. Beach explained that he was selling the car to the people inside. R. 65 [14]. He also produced a bill of sale for the car. R. 65 [22]. Those in the car confirmed that Mr. Beach was selling them the car. R. 65 [60]. At that point, the police were legally obligated to release Mr. Beach because the purpose of the stop had been effectuated.

Instead, the police persisted in questioning Mr. Beach for a total of twenty-two minutes. R. 65 [16]. They asked him three times for his consent to a search in spite of his obvious reluctance to consent. R. 65 [19-29]. They told him they wanted to search him to "find out" what he was doing wrong. R. 65 [25]. It was apparent that the officers intended to detain him until they were satisfied that he did not possess any controlled substances. The prosecutor had an increased burden of proof in this case because of the officers' prior illegal stop and detainment. State v. Arroyo, 796 P.2d 684, 687 (Utah 1990). The prosecutor failed to meet this burden to prove that Mr. Beach's consent was

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[6] See Salt Lake City v. Ray, 2000 UT App 55, ¶ 19, 998 P.2d 274 ("the facts known to the officers regarding Ray were at least as consistent with lawful behavior as with the commission of a crime").

[7] See State v. Hansen, 2000 UT App 353, ¶ 11, 17 P.3d 1135 cert. granted State v. Hansen, 26 P.3d 235 (Utah 2001) ("Both 'the length and scope of the detention must be 'strictly tied to and jusified by' the circumstances which rendered its initiation permissible.'") (citations omitted).

voluntary. Therefore, evidence of controlled substances should have been suppressed.

ARGUMENT

I. BECAUSE THERE WAS NO REASONABLE, ARTICULABLE SUSPICION TO STOP MR. BEACH AND DETAIN HIM FOR TWENTY-TWO MINUTES, EVIDENCE OF DRUGS SUBSEQUENTLY DISCOVERED ON HIS PERSON SHOULD HAVE BEEN SUPPRESSED

Evidence of controlled substances found in Mr. Beach's possession is the fruit of an unconstitutional seizure and its admission makes the court a party to a lawless invasion of individual constitutional rights. The police were not justified in stopping Mr. Beach because they did not have a reasonable, articulable suspicion that he was involved in criminal activity. He was merely leaning into the passenger window of a car exchanging paperwork for the sale of the car with the passenger. R. 65 [9, 14]. Even if this gave rise to reasonable suspicion, the police were legally required to release him once he explained that he was selling the car and showed them the bill of sale. This is particularly so in light of the buyers' corroboration of Mr. Beach's explanation. R. 65 [20]. Instead of releasing him, however, the police persisted in questioning him and retained his state identification card to run a warrants and criminal history check. R. 65 [20-29, 61]. They also persisted in requesting his consent to a search of his person. Id. In these circumstances, the ultimate discovery of controlled substances was the fruit of an illegal seizure and should have been suppressed.

A. Mr. Beach was Seized for Fourth Amendment Purposes Because the Police Approached with Emergency Lights Flashing, Called for his Return, and Retained his Identification Card While Running a Warrants Check

A trial court's determination of whether a person has been seized for Fourth Amendment purposes is best understood in the context of the three possible levels of police intrusion. Those three levels are as follows:

> (1) an officer may approach a citizen at any [] time and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Contrel, 886 P.2d 107, 108 (Utah Ct. App. 1994). A seizure of a person, or level two intrusion, occurs "[w]hen a reasonable person, based on the totality of the circumstances, remains, not in the spirit of cooperation with the officer's investigation, but because he believes he is not free to leave . . . ." State v. Trujillo, 739 P.2d 85, 87 (Utah Ct. App. 1987). In other words, a person is seized once a police officer "'by means of physical force or show of authority has in some way restrained the liberty of a person." Salt Lake City v. Ray, 2000 Utah Ct. App. 55, ¶ 11, 998 P.2d 274 (quoting State v. Bean, 869 P.2d 984, 986 (Utah Ct. App. 1994)).

In this case, Mr. Beach was seized. As he walked down the side of the street an unmarked car containing three police officers pulled over and emergency lights began flashing. R. 65 [6, 12]. Officer Leavitt emerged from the car and called out to Mr. Beach, identifying himself as a police officer and asking him to return and answer some

questions. R. 65 [19]. After taking Mr. Beach's identification, Officer Leavitt did not simply view the information and return the card. He retained the card while Officer Sharman ran a warrants and driver's license check on Mr. Beach. R. 65 [25-28]. In these circumstances, a reasonable person would not have felt free to leave.

This Court's recent decision in Salt Lake City v. Ray is dispositive. In that case, this Court held that a defendant was seized when she was confronted in front of a convenience store by two uniformed police officers who wore badges and guns. Ray, 2000 Utah Ct. App. 55, ¶ 14. The officers asked for her identification and, rather than viewing the information and returning the card, one of the officers retained her card for approximately five minutes while he performed a warrants check. The other officer continued questioning her. Id. Citing several dispositive cases,[8] this Court found that "[g]enerally, when a person's identification or other important papers are taken by a law enforcement officer, a reasonable person would not feel free to leave." Id. Thus, the defendant in Ray was seized for Fourth Amendment purposes after her identification card

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[8] This Court cited the following supporting cases: Florida v. Royer, 460 U.S. 491, 493 (1983) (defendant seized at an airport when two plainclothes detectives, after retaining his identification and airline ticket, asked him to accompany them to a private room where they eventually made a consensual search of his belongings); and United States v. Chan-Jimenez, 125 F.3d 1324, 1325 (9th Cir. 1997) (defendant seized when an officer approached him at the side of the road, asked for his driver's license and registration, and without returning the documents asked to look in the bed of defendant's truck).

This Court also cited the following supporting cases: United States v. Lambert, 46 F.3d 1064, 1068 (10th Cir. 1995); Reynolds v. Maryland, 746 A.2d 422 (1999); State v. Holmes, 569 N.W.2d 181, 185 (Minn. 1997); State v. Godina-Luna, 826 P.2d 652, 655 (Utah Ct. App. 1992); and State v. Johnson, 771 P.2d 326, 328 (Utah Ct. App. 1989).

was retained. Id. at 280.

In this case, the police made a level two seizure because they activated their emergency lights and called for Mr. Beach's return. Then they held his identification cards while running a warrants and criminal history check. Mr. Beach was obliged to stay, and was thus seized for Fourth Amendment purposes.

B. The Seizure of Mr. Beach was Illegal at its Inception Because It was Based Upon Nothing More than a Police Officer's Hunch that he Could Unearth Some Illegal Activity

A police officer may not seize a person on the basis of a hunch that the person is involved in criminal activity. Terry v. Ohio, 392 U.S. 1, 22 (1968). In determining whether a level two seizure is justified, it must be determined whether the public interest in crime prevention outweighs the individual right to personal security and privacy. Terry, 392 U.S. at 23; State v. Trujillo, 739 P.2d 85, 90 (Utah Ct. App. 1987). To justify a level two seizure, a police officer must have a reasonable, articulable suspicion that a person is engaged in criminal activity. State v. Kohl, 2000 UT 35, ¶ 11, 999 P.2d 7. Only then will the balance between the public interest in crime prevention and the personal security of individuals tilt in favor of crime prevention to allow for personal seizure. As the United States Supreme Court indicated in the landmark case of Terry v. Ohio:

> [a]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. . . . And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would

> evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Terry, 392 U.S. at 22 (citations omitted).

The constitutional requirement of reasonable suspicion is codified in Utah Code Ann. § 77-7-15. Section 77-7-15 states:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Utah Code Ann. § 77-7-15 (1999). Thus, under the statute, "a 'brief investigatory stop of an individual by police officers is permissible when the officers 'have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.'"" Trujillo, 739 P.2d at 88 (citations omitted).

In this case, the trial court made pertinent findings with regard to the circumstances of Mr. Beach's seizure. The court's findings were as follows:

> [T]he officer made a stop in a known drug region. The officer's specific assignment is pursuit and interdiction with drugs. There was a known drug house in the neighborhood that they had been observing. The officer observed what he though was a hand-to-hand exchange which indeed prove[d] to be truthful. There was a hand-to-hand exchange. He thought it was narcotics, the explanation given was that it was in relation to a transaction for a sale of a vehicle. The officer learned only of the purchase of the vehicle by Beach and did not ever have a problem confirming information as to the sale of the vehicle by Beach to the person sitting in the car.
>
> He pulled over immediately, activated his lights, gave his identification and asked Beach to come up and talk to him. And he did. Beach seemed anxious, he seemed nervous. He was rocking from side to side. . . .

R. 65 [60]. The trial court omitted to mention that Officer Leavitt testified Mr. Beach was not in front of the suspected drug house. R. 65 [17]. Also, the police had not received any information about Mr. Beach or the vehicle he was selling. Id. Mr. Beach and the individuals in the car continued their transaction and were unconcerned as the police drove slowly by. R. 65 [18]. Finally, Mr. Beach readily met Officer Leavitt's gaze when he tried to make eye contact. R. 65 [12].

The trial court also omitted to make a legal conclusion based upon its findings. R. 65 [60-62]. Instead, the court simply moved past the issue of whether there was reasonable suspicion and found that Mr. Beach had voluntarily consented to the search of his person. R. 65 [61].

Applying the law correctly, the trial court should have found that there was not a reasonable, articulable suspicion justifying the seizure of Mr. Beach. Reasonable suspicion must be based upon objective facts, and not upon intuition or "inarticulate hunches." Terry, 392 U.S. at 22. Although "a trained law enforcement officer may be able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer," Trujillo, 739 P.2d at 88, "specific and articulable facts" must nevertheless support the seizure. Ray, 2000 Utah Ct. App. 55, ¶ 18. These facts must be drawn from the totality of circumstances facing the officers at the time of the seizure. Id.

There are several cases directly on point. In State v. Trujillo this Court found that the seizure of a man walking down State Street at 3:30 a.m. with two friends was not

reasonable because nothing distinguished the man's activity from that of any other pedestrian in the area. Trujillo, 739 P.2d at 90. The defendant and his friends had been peering into business windows and at one point stared at a poster located outside an adult theater. Id. at 86. The defendant carried a nylon knapsack and shifted "this knapsack from his side to his front in what [the observing police officer] considered an effort to conceal it." Id. However, the officer "did not see the trio violate any traffic ordinances or engage in any criminal behavior." Id.

The officer pulled over, got out, and walked towards the trio. The defendant placed his knapsack next to a garbage can "in what [the police officer] regarded as an effort to 'stash it.'" Id. Nobody attempted to avoid the officer. Id. However, all three appeared nervous. Id. The officer asked them for identification and an explanation of their activities. Id. Only one of the trio produced identification and the defendant explained that they were on their way to his cousin's house. Id. A backup officer soon arrived. Id. At that point, the defendant was instructed to place his hands on the patrol car and spread his feet. Id. The officer patted him down and discovered an 8" to 10" knife strapped to his chest. Id. The defendant was arrested for possession of a dangerous weapon by a restricted person. Id.

The officer testified that his decision to stop and detain the defendant was based upon the following: "(1) it was a high-crime area; (2) the lateness of the hour; (3) the apparent nervous conduct of the trio; and, (4) the `suspicious' nylon knapsack" the defendant carried. Id.

This Court found that "[w]hile [the officer] testified that the situation looked suspicious, he was unable to point to specific objective facts to support his 'hunch.'" Id. at 90. Specifically, this Court indicated that nervous behavior by people approached by police officers "is consistent with innocent as well as with criminal behavior." Id. at 89. Further, there was no evidence that the defendant was "casing" the businesses or that there was anything unusual about walking down State Street at a late hour. Id. Finally, there was no distinguishable reason for the officer's concern regarding the defendant's knapsack. Id. Thus, the officer was not justified in stopping and detaining the defendant, and the ultimate discovery of the knife was unconstitutional and should have been suppressed at trial. Id.

In another case, Salt Lake City v. Ray, a police officer arrived at a 24-hour convenience store to investigate a "suspicious female." Ray, 2000 Utah Ct. App. 55, ¶ 3. He found a woman standing outside near the pay phone and the store clerk confirmed that this woman was the "problem person." Id. Wearing full uniform, he approached the woman and began questioning her. She told the officer that she had made a purchase at the store earlier, and was waiting for a ride to work. Id. at ¶ 4. She said she had been waiting thirty minutes, but the store clerk indicated that she had been there for two hours. Id. Another officer arrived and also began questioning the woman. Id. The woman "appeared nervous, although not agitated, and she talked fast and repeatedly shifted her weight from one foot to the other." Id. at ¶ 5. The officer took the woman's state identification card and ran a warrants check on her. Id. Meanwhile, the officer who had

originally approached the woman asked her about the contents of her bag. Id. Ultimately, drug paraphernalia was discovered in her bag. Id. at ¶ 6.

In reversing the woman's conviction, this Court held that the police did not have reasonable suspicion to stop and detain her. Id. at ¶ 19. This Court indicated that "'[i]n determining whether this objective standard has been met, the focus necessarily centers upon the facts known to the officer immediately before the stop.'" Id. at ¶ 18. (quoting State v. Friesen, 1999 UT App 262, ¶ 12, 988 P.2d 7). Because the facts known to the officers "were at least as consistent with lawful behavior as with the commission of a crime," reasonable suspicion did not support the seizure.[9] Further, the officers had no knowledge that the woman had committed or was about to commit a crime. Id. Thus, reasonable suspicion did not support the seizure of the woman. Id. at ¶ 20.

Like the defendants in Trujillo and Ray, Mr. Beach's behavior was at least as consistent with lawful behavior as with criminal activity.[10] Mr. Beach was merely leaning

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[9] Id. at ¶ 19. The facts known to the officers were that:

> (1) Boehner had reported - and the officers received a dispatch for - a 'suspicious female,' regarding Ray; (2) Ray was standing outside the store near a pay phone; (3) Ray had made an earlier purchase in the store; (4) an empty container near Ray confirmed she had made a purchase; (5) Ray was waiting for a ride to work which had not materialized; (6) although Ray stated at first she had been waiting for thirty minutes, Boehner said she had been there for two house; (7) while being questioned, Ray appeared nervous, talked fast, and shifted her weight from one foot to the other.

Id. at ¶ 19 n. 8.

[10] See Ray, 2000 UT App 55, ¶ 19 ("the facts known to the officers regarding Ray were at least as consistent with lawful behavior as with the commission of a crime"); Trujillo, 739 P.2d at 90 (reasonable suspicion not found because there was "nothing to distinguish Trujillo's

into the passenger side window of a parked car speaking with the passenger. R. 65 [9]. He was doing so in broad daylight, R. 65 [16], and even though there was a suspected drug house in the neighborhood, Mr. Beach was not near the house. R. 65 [17]. This is common behavior which many people engage in regularly.

The "hand-to-hand exchange" that Mr. Beach engaged in with the passenger proved to be an exchange of paperwork for the sale of the car, R. 65 [9, 18], and this was made known to the police within a few minutes of the stop. R. 65 [20]. The officer could not testify that there was anything significant or unusual about the exchange which caused him to believe it was a drug transaction. R. 65 [18]. The people involved did not seem concerned as the officers passed. R. 65 [18]. Nor did Mr. Beach avoid eye contact with Officer Leavitt. R. 65 [18]. If anything, this should have reassured the officers that illegal activity was not taking place.

Officer Leavitt testified that, as he questioned Mr. Beach, Mr. Beach became anxious and nervous. However, it has been soundly recognized that this is the reaction of many people when questioned by the police, and this does not constitute a basis for reasonable suspicion. Ray, 2000 Utah Ct. App. 55, ¶ 19; State v. Yoder, 935 P.2d 534, 541 (Utah Ct. App. 1997); State v. Robinson, 797 P.2d 431, 436 (Utah Ct. App. 1990); Trujillo, 739 P.2d at 89.

In essence, there was nothing to distinguish Mr. Beach's behavior from that of any other person. Every day many people all over the city speak with others parked at street

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activity from any other pedestrian in the area").

curbs, and frequently they exchange items or paperwork with each other. This activity does not provide a basis for the police to indulge in a level two seizure and go on a fishing expedition for contraband.

On the basis of the above, the trial court should have concluded that reasonable suspicion did not support the seizure of Mr. Beach. Thus, the ultimate discovery of the drugs should have been suppressed. Because it was not, Mr. Beach's conviction should be reversed and this case should be remanded.

C. The Questioning of Mr. Beach Went Beyond the Scope of the Stop Because the Police Continued to Detain and Question Him After he Gave a Legitimate Explanation of his Activities that was Corroborated by Paperwork and Two Witnesses

Even if reasonable suspicion supported the initial seizure of Mr. Beach, Mr. Beach is entitled to a reversal of his conviction because the police failed to release Mr. Beach after receiving a truthful, lawful explanation of his activities. Immediately after being asked to explain his activities, Mr. Beach said that he is in the business of refurbishing old cars for resale, and that he was in the process of selling the car. R. 65 [14]. He produced a bill of sale as proof of the transaction, R. 65 [22], and Officer Leavitt could have confirmed Mr. Beach's story with the individuals in the car at any time. R. 65 [60]. Because the police received a corroborated, lawful explanation, and because there was no indication of illegal activity, the police were legally obliged to release Mr. Beach.[11]

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[11] See State v. Hansen, 2000 UT App 353, ¶ 11, 17 P.3d 1135 ("Both 'the length and scope of the detention must be 'strictly tied to and justified by' the circumstances which

However, they persisted in questioning him for a total of twenty-two minutes, R. 65 [16], and asked him three times for consent to a search of his person. R. 65 [22-29]. They were not satisfied when he emptied his pockets and showed them the contents. Id. When he asked whether he had done anything wrong, they told him "[w]e're gonna find that out . . . ." R. 65 [25]. Under these circumstances, Mr. Beach was unreasonably detained beyond the legitimate scope of the stop.

Because every person has a Fourth Amendment right to the "'possession and control of his own person, free from all restraint or interferences of others,'" Terry v. Ohio, 392 U.S. 1, 9 (1968), the seizure of a person may be justified only "by clear and unquestionable authority of law." Id. In other words, the need to seize must be balanced against the invasion which the seizure entails. Id. at 21. The balance does not tilt in favor of seizure unless the seizure is supported at its inception by reasonable suspicion. State v. Trujillo, 739 P.2d 85, 88 (Utah Ct. App. 1987). Further, the "detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop . . . .'" State v. Contrel, 886 P.2d 107, 109 (Utah Ct. App. 1994). Specifically, "'[t]he length and scope of the detention must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.'" Hansen, 2000 UT App 353, ¶ 11.

Recently, in State v. Hansen, this Court found that a police officer exceeded the

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rendered its initiation permissible.'") (citations omitted); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) ("If reasonable suspicion of more serious criminal activity does arise, the scope of the stop is still limited. The officers must 'diligently [pursue] a means of investigation that [is] likely to confirm or dispel their suspicions quickly, during which time it [is] necessary to detain the defendant.")

permissible scope of a traffic stop when, after attending to the matter of the traffic violation, he returned the driver's license and registration, but failed to inform the driver that he was free to leave. Id. at ¶ 13-14. The officer also remained parked behind the car with emergency lights flashing, and asked the driver the investigatory question of whether he had drugs, alcohol, or weapons in the car. Id. at ¶ 14-15. Further, the officer did not inform the driver how he had resolved the issue of the traffic violation before he asked an investigatory question not related to the violation. Id. at ¶ 15. In these circumstances, this Court held that the driver "was illegally detained when Officer Huntington asked him questions that were not reasonably related in scope to the traffic violation which justified the initial seizure." Id. at ¶ 16.

In another case, State v. Robinson, this Court found that a police officer exceeded the permissible scope of a stop when he pulled the defendant over after the defendant abruptly swerved into the officer's lane. Robinson, 797 P.2d at 433. After the defendant gave the officer his California driver's license and explained that he had borrowed the van from his employer, the officer wrote the defendant a warning for abruptly crossing traffic lanes. Id. Another officer arrived on the scene and the two officers observed a homemade bed, two gym bags, and a fishing pole in the back of the van. Id. They asked the defendant and his companion if they were carrying weapons, large amounts of money, or narcotics. Id. at 434. Both the defendant and his companion replied in the negative. Id.

Then the officers asked for consent to search the van. Id. Consent was given. Id.

They searched the van and found an under-bed compartment. Id. In the compartment they discovered fresh wood shavings and carpet fibers. Id. The driver protested when he was asked for permission to remove some screws so that the officers could search under the boards. Id. One of the officers stated that he would normally impound the van as a possible stolen vehicle. Id. Then he said, "[i]f there's nothing under that [bed] like you say, if we was [sic] to look under there, I would see what's under there and you could be on your way." Id. Another officer said, "[s]ince you won't let us take the plywood panel off the van to look under the bed, would it be all right if we let a dog go through the vehicle?" Id. Eventually, permission was given to let a dog search. A police dog arrived and located eight duffel bags of marijuana in the space under the bed's platform. Id.

This Court found that the legal basis for the stop ended after the matter of the lane change was resolved. Id. 437. However, the officers persisted in questioning the driver and his companion for twenty minutes and repeatedly requested permission to search the vehicle. Id. at 437-38. This Court found that "it was apparent that the defendants would be kept in that custodial environment until the troopers satisfied their curiosity about the contents of the van, particularly the area under the bed." Id. at 438. Thus, the ultimate discovery of the marijuana was unlawful and should have been suppressed at trial. Id.

In light of this precedent, Mr. Beach's conviction should be reversed. The seizure of Mr. Beach was not supported by reasonable suspicion in the first place.[12] However,

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[12] See Subsection I, B of this brief (arguing that the police did not have reasonable suspicion to stop Mr. Beach).

even if it was, the seizure should have ended when the purpose of the stop was effectuated.[13] Officer Leavitt testified that the purpose of the stop was to determine whether Mr. Beach was involved in a drug transaction when he made a "hand-to-hand exchange" with the passenger of the car. R. 65 [9-11]. That suspicion proved to be unfounded. Mr. Beach explained that he was selling the car and produced proof of sale, and the buyers stated that they were buying the car. R. 65 [60]. At that point, the officers were legally obliged to release Mr. Beach.

However, the officers illegally detained Mr. Beach beyond the scope of the stop. They held his state identification card to run a warrants check, R. 65 [26] and asked him for consent to a personal search three times. R. 65 [28]. All three officers remained present, R. 65 [28], the questioning did not cease, R. 65 [22-29], and Mr. Beach was never told that he could leave. Id. In these circumstances, Mr. Beach reasonably believed he would not be allowed to leave until the police satisfied themselves about whether he possessed any controlled substances. Thus, the detainment went beyond the permissible scope of the stop.[14]

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[13] See Contrel, 886 P.2d at 109 (the seizure must "last no longer than is necessary to effectuate the purpose of the stop . . . .")

[14] See Hansen, 2000 UT App 353, ¶ 12 ("For the seizure to end, it must be clear to the seized person, either from the words of an officer or from the clear import of the circumstances, that the person is at liberty to go about his or her business.") (quoting State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994)).

II. THE STATE FAILED TO SHOW THAT MR. BEACH'S CONSENT TO A SEARCH OF HIS PERSON WAS VOLUNTARY IN LIGHT OF THE COERCIVE CIRCUMSTANCES AND THE PRIOR ILLEGAL STOP AND DETAINMENT

Mr. Beach's consent to the personal search was not voluntary. In spite of his obvious reluctance to submit to a search,[15] Officer Leavitt asked him three times to consent to one, R. 65 [19-29], and questioned him for a total of twenty-two minutes. R. 65 [16]. The officers informed him that they wanted to search him to "find out" what he was doing wrong. R. 65 [25]. They also retained his identification card to run a warrants check. R. 65 [24-28]. They checked the status of his driver's license even though he had already informed them that he did not have one. R. 65 [26]. It was apparent that the police intended to detain him until they had satisfied themselves about whether he had any contraband in his possession. These circumstances are coercive. Also, the police officers' lack of reasonable suspicion to stop Mr. Beach in the first place, or detain him after he explained his activities, increased the prosecutor's burden of proof. The prosecutor failed to meet this burden, and Mr. Beach's consent cannot be considered voluntary.

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[15] After being asked to consent to a search, Mr. Beach did not answer, but began pulling items out of his pockets to show to the officer. R. 65 [22-23]. The items included a yellow sales slip, a flyer, and money. R. 65 [22-24]. Mr. Beach was asked to submit to a search a second time, and he asked whether he had done anything wrong. R. 65 [24-25]. Officer Leavitt responded "[w]e're gonna find that out . . . ." R. 65 [25]. At that time Officer Sharman was running checks on Mr. Beach's identification card. Mr. Beach showed Officer Leavitt an adult magazine, and Officer Leavitt returned the magazine to him. R. 65 [27-28]. Officer Sharman joined Officer Leavitt as he questioned Mr. Beach, and then Mr. Beach was asked a third time to submit to a search. R. 65 [28]. Mr. Beach eventually submitted. Id.

"A warrantless search is a per se Fourth Amendment violation unless the State can establish one of the 'few specifically established and well-delineated exceptions.' . . . One of the clearly established exceptions is a consent." State v. Hansen, 2000 UT App 353, ¶17, 17 P.3d 1135. "However, evidence from a consent search can only be admitted if the State establishes that consent was voluntary, and that the search did not exceed the scope of that consent." State v. Castner, 825 P.2d 699, 703 (Utah Ct. App. 1992). Consent which is not voluntarily given is invalid. State v. Arroyo, 796 P.2d 684, 687 (Utah 1990).

Significantly, "[w]hen the prosecution attempts to prove voluntary consent after an illegal police action (e.g., unlawful arrest or stop), the prosecution 'has a much heavier burden to satisfy than when proving consent to search' which does not follow police misconduct." Id. at 687-88 (quoting United States v. Melendez-Gonzalez, 727 F.2d 407, 414 (5th Cir. 1984)). The State must show that the consent was both voluntary in fact, and obtained without police exploitation of the prior illegality. State v. Robinson, 797 P.2d 431, 437 (Utah Ct. App. 1990). Voluntary consent is that which is, in fact, voluntarily given, and not the result of "duress or coercion, express or implied." Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973). In determining whether the evidence was obtained without police exploitation of the prior illegality, it must be determined whether the evidence was obtained "by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). In other words, it must be shown that the police did not "use the fruits of the primary illegality to coerce

[the] defendant into *granting* his consent." United States v. Carson, 793 F.2d 1141, 1148 (10th Cir. 1986).

It is the State's burden to prove that Mr. Beach voluntarily gave his consent to the search, and the State failed to prove this. Mr. Beach's consent was coerced. The presence of three officers, who did not release him after receiving a corroborated explanation of his activities, the repeated requests for consent to search in spite of Mr. Beach's obvious reluctance, and the retention of Mr. Beach's identification, created coercive circumstances.

Additionally, the police used the fruits of their prior illegal stop and detainment to coerce Mr. Beach into granting his consent to the search.[16] The police stopped Mr. Beach without reasonable suspicion that he was involved in criminal activity. They merely had a hunch that Mr. Beach was conducting a drug transaction with the people in the car. After stopping him, they learned that a drug transaction was not taking place. Rather than releasing him, however, they persisted in questioning him and in requesting his consent to a search. This ultimately led to Mr. Beach's production of drugs, and the discovery of drugs on his person. The consent and discovery was not sufficiently attenuated from the prior illegal seizure. The same officer questioned him continually throughout the episode, there was no intervening event, and Mr. Beach's consent was obtained solely through

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[16] See Id. ("'In the context of voluntary consent,' the court held that 'exploitation of the primary illegality' meant that the police use the fruits of the primary illegality to coerce [the] defendant into *granting* his consent.") (citation omitted).

exploitation of the prior illegal stop and detainment.[17]

Mr. Beach's eventual consent to the search is not valid, and the trial court should have suppressed evidence of the controlled substances found. Instead, the trial court made a cursory summary of Officer Leavitt's testimony. R. 65 [60-61]. Then the court concluded that Mr. Beach's consent was voluntarily given. R. 65 [61].

The trial court's summary of Officer Leavitt's testimony is not a comprehensive body of findings of fact. The trial court did not chronicle the sequence of events, did not mention the second request to search, did not discuss the conversation between Mr. Beach and the officers, did not mention the length of time that Mr. Beach was questioned, and could not remember exactly what evidence was found in the search.[18]

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[17] Officer Leavitt testified that after Mr. Beach finally gave consent to the search, he was informed that he was not required to give consent. R. 65 [28]. However, this did not serve to attenuate the consent from the prior illegal stop and detainment. The police obtained Mr. Beach's consent solely because of they illegally stopped him in the first place. They suspected a drug transaction and persisted in questioning Mr. Beach even after it was shown that there was no drug transaction. They asked his consent three times in spite of his reluctance to grant it, and the overall circumstances were coercive. Thus, Officer's Leavitt's statement did not serve to attenuate the consent from the prior illegal stop and detainment.

[18] The trial court's summary of Officer Leavitt's testimony was as follows:

> The officer asked if he could search. The officer asked several questions. Beach was pulling things out of his pocket. Some of which were related to the purchase of the vehicle, not the sale of the vehicle, and Beach indicated that he had committed at least two motor vehicle offenses, one that he driven the car over to the location on a suspended license and two, that he hadn't acknowledged that he didn't have a suspended license that this officer with other officers checked out to see if there were any NCIC hits on the vehicle and on Beach's ID. Those were confirmed to be negative.
>
> Then the officer asked him if he could search further to see if he had any meth or contraband on him and Beach said, "I have a little." That was the testimony the

The court concluded, "I don't see anything in this stop that causes me to conclude that the results of information of being sought were anything but voluntary." R. 65 [61].

This conclusion is properly reviewed for correctness. Hansen, 2000 UT App 353, ¶7. The conclusion is incorrect because it fails to take into account the coerciveness of repetitive requests for consent to search and the implications in the conversation between Mr. Beach and the police that Mr. Beach would be held until the police were satisfied that he did not possess contraband.[19] The conclusion also fails to take into account the State's increased burden of proof due to the prior illegal stop and detainment. The conclusion is not soundly based and is incorrect. Thus, Mr. Beach's conviction should be reversed and this case should be remanded.

CONCLUSION

In light of the above, Mr. Beach's conviction should be reversed and this case should be remanded to the trial court with instructions to suppress evidence of controlled

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> officer quoted. Beach than pulled out one baggy and Beach asked if he could search for, excuse me, Leavitt asked if he could search Beach further and Beach said go ahead. The officer then searched and found, as I recall, two other baggies. So I think there wer two baggies total, there were two plus the one pulled out for a total of three. I don't recall that specific detail.

R. 65 [60-61].

[19] See R. 65 [25] (Officer Leavitt testified he told Mr. Beach "[w]e're gonna find out" whether Mr. Beach had done anything wrong "apart from what he already previously admitted to, driving on a suspended licens[e], driving a vehicle that didn't have any registration or any registration stickers, no plates, besides that); R. 65 [21-22, 24, 28] (Officer Leavitt testified he told Mr. Beach several times the purpose of searching would be to discover drugs, needles, knives, weapons, or other contraband.)

substances found in Mr. Beach's possession.

RESPECTFULLY SUBMITTED this 12 day of October, 2001.

HEATHER JOHNSON
Attorney for Defendant/Appellant

OTIS STERLING III
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, HEATHER JOHNSON, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 12 day of October, 2001.

HEATHER JOHNSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____day of October, 2001.

ADDENDUM A

IMAGED

FILED DISTRICT COURT
Third Judicial District

MAY 08 2001

SALT LAKE COUNTY
By _____ Deputy Clerk

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 001915802 MO
KENNETH BEACH, Defendant.	:	Judge: DAVID S YOUNG Date: May 4, 2001

Custody: Pre-Trial Services

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 5/9/01

PRESENT
Clerk: taunah
Prosecutor: SHEFFIELD, KELLY R
Defendant
Defendant's Attorney(s): STERLING, OTIS
Agency: Adult Probation & Parole

DEFENDANT INFORMATION
Date of birth: November 26, 1965
Video
Tape Number: 2001-18 Tape Count: 9:15

CHARGES

1. ATTEMPTED ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE (amended) - Class A Misdemeanor
Plea: Guilty - Disposition: 02/09/2001 {Guilty Plea}

SENTENCE JAIL

Based on the defendant's conviction of ATTEMPTED ILLEGAL POSS/USE OF CONTROLLED SUBSTANCE a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) The total time suspended for this charge is 245 day(s).

Credit is granted for time served.
Credit is granted for 43 day(s) previously served.

Criminal Sentence @J
001915802 JD1851638
BEACH, KENNETH JD

Case No: 001915802
Date: May 04, 2001

SENTENCE JAIL RELEASE TIME NOTE

Defendant is to serve jail time until 5-31-01, then is to be released from custody on that date.

SENTENCE FINE

Charge # 1 Fine: $2800.00
Suspended: $2500.00
Surcharge: $255.00
Due: $555.00

Total Fine: $2800.00
Total Suspended: $2500.00
Total Surcharge: $255.00
Total Principal Due: $555.00
Plus Interest

SENTENCE TRUST

The defendant is to pay the following:
Attorney Fees: Amount: $250.00 Plus Interest
Pay in behalf of: LDA

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation & Parole.
Defendant to serve 120 day(s) jail.

Defendant is to pay a fine of 555.00 where the surcharge has been added to the fine. Interest may increase the final amount due.
Pay fine to The Court.

Case No: 001915802
Date: May 04, 2001

PROBATION CONDITIONS

Usual and ordinary conditions required by the Department of Adult Probation & Parole.
Submit to searches of person and property upon the request of any Law Enforcement Officer.
Do not use, consume or possess alcohol or illegal drugs, nor associate with any people using, possessing or consuming alcohol or illegal drugs.
Submit to tests of breath and urine upon the request of any Law Enforcement Officer.
Participate in and complete any educational; and/or vocational training as directed by the Department of Adult Probation and Parole.
Violate no laws.
Enter, participate in, and complete any program, counseling, or treatment as directed by the Department of Adult Probation and Parole.
Participate in mental health counseling.
Submit to drug testing.
Not frequent any place where drugs are used, sold, or otherwise distributed illegally.
Refrain from the use of alcoholic beverages.
Complete GED or high school equivalent
Maintain full time employment

Dated this 8 day of May, 2001.

DAVID S YOUNG
District Court Judge